

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUINTIN WRIGHT,

Defendant-Appellant.

UNPUBLISHED

June 27, 2006

No. 261040

Wayne Circuit Court

LC No. 04-010423-01

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), possession of marijuana, MCL 333.7403(2)(d), and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to two years probation for his convictions. We affirm.

While on patrol in August 2004, two Detroit police officers, Burris and Clark, observed the passenger of a maroon Concord holding a glass pipe to his mouth with a flame emanating from a lighter. The officers approached the vehicle and identified defendant as the occupant and requested that he step out of the vehicle. Following another command to leave the vehicle, the officers testified that they tried to physically remove defendant from the vehicle when he began resisting them. As Burris was trying to handcuff defendant, he yelled to Clark that defendant had a “gun.” After wrestling with defendant, including the use of pepper spray, defendant attempted to run away and was dragged to his feet. The officers had to wrestle with defendant and eventually they were able to lay on top of him for four or five minutes until backup arrived.

Following his arrest, a search of the car defendant was seated in, revealed a nine millimeter handgun, a crack pipe and a baggy of marijuana. Defendant was charged as a second habitual offender, MCL 769.10, assault with a dangerous weapon, MCL 750.82, possession of a firearm by a felon, MCL 750.224f; carrying a concealed weapon, MCL 750.227, possession of less than 25 grams of cocaine, MCL 750.81d(1), possession of marijuana, MCL 333.7403(2)(d) and possession of a firearm during the commission of a felony, MCL 750.227b. Before trial, defendant missed his preliminary examination due to the fact that his employer stated he was working for her at the time of the preliminary hearing. He was arrested in Mackinac County and returned to Detroit where he stood trial for the enumerated charges. The jury found defendant guilty of possession of less than 25 grams of cocaine, possession of marijuana and resisting and obstructing a police officer. The jury found defendant not guilty of all other charges.

Defendant first argues that the trial court erred in determining that the flight instruction was applicable to the facts of his case.

Generally, this Court reviews claims of instructional errors de novo. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005). Additionally, “a trial court’s determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion.” *Id.*

“Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). “Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights.” *Id.*

“It is well established in Michigan law that evidence of flight is admissible.” *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term “flight” has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Id.*, citing 29 Am Jur 2d, Evidence, § 532, p 608. Evidence of flight by itself is insufficient to sustain a conviction; however, “such evidence is probative because it may indicate consciousness of guilt.” *Coleman, supra* at 4.

In the present case, the evidence revealed that defendant left the city of Detroit following his arrest and release on bond. Linda Sayles, defendant’s employer, testified that she and defendant were “aware” of defendant’s preliminary examination date and that defendant missed the preliminary examination because he was renovating one of Sayles’s “empty houses” in the upper peninsula area. Further, the record reveals that defendant did not return to the jurisdiction for his initial preliminary examination hearing and that a bench warrant was issued for his arrest on September 18, 2004. Officer Gentry Shelby was notified by the Mackinac County Sheriff’s Department that defendant was in their custody. An officer with the Detroit Police Department went to Mackinac and returned defendant to the Wayne County Jail on September 20, 2004. At trial, the trial court instructed the jury based on CJI2d 4.4 as follows:

Now there has been some evidence that defendant ran away after he was charged with this crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear. However, a person may also run or hide because of a consciousness of guilt. You must decide whether the evidence is true, and, if true, whether it shows that the Defendant had a guilty state of mind.

The evidence revealed that defendant was aware of his preliminary examination date. Further, defendant did not return to Detroit on his own recognizance. Defendant only appeared for the preliminary examination after he was taken into custody by the Mackinac County Sheriff’s Department and returned to Detroit by an officer with the Detroit Police Department. Moreover, the trial court gave the proper flight instruction pursuant to CJI2d 4.4. The instruction allowed the jury to decide whether defendant fled, and, if he had fled, whether defendant did so for innocent reasons or because he had a guilty conscience. The challenged instruction “fairly presented the issues for trial and sufficiently protected” defendant’s rights. *Canales, supra* at

574. Therefore, the flight instruction was supported by the facts of the case and the trial court did not abuse its discretion in giving the flight instruction to the jury.

Defendant also argues that evidence that he fled prior to trial was not relevant, and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under MRE 403. We note that defendant failed to include this issue in the questions presented section of his brief as required by MCR 7.212(C)(5) and has failed to preserve the issue for review. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Furthermore, Shelby's testimony was probative because it may indicate defendant's consciousness of guilt. *Coleman, supra* at 4. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because it would not be given undue or preemptive weight and it was not inequitable to allow use of the evidence. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Any unfair prejudice was extinguished by the trial court giving the proper cautionary instruction that defendant's flight could only be used for a limited purpose. Additionally, to the extent that defendant challenges Sayle's testimony, we conclude that defendant has waived the issue on appeal. Where a defendant calls a witness and elicits testimony from that witness, issues related to that testimony are waived for appeal. *People v Riley*, 465 Mich 442, 448-450; 636 NW2d 514 (2001). "A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Further, defense counsel may intentionally relinquish a defendant's rights with respect to evidentiary objections. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Since defendant elicited testimony from Sayles regarding defendant's whereabouts prior to defendant's preliminary examination, defendant may not claim error on appeal regarding the relevancy and prejudicial effects of Sayles's testimony.

Defendant finally raises two allegations of ineffective assistance of counsel. Since defendant failed to move for a new trial or a *Ginther*¹ hearing after trial, our review is limited to facts contained in the lower court record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.*

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that he was denied effective assistance of counsel because defense counsel failed to object to Shelby's testimony that defendant failed to appear for his preliminary examination. We disagree.

As discussed above, Shelby's testimony regarding defendant's failure to appear for his preliminary examination was probative because it may indicate defendant's consciousness of guilt. *Coleman, supra* at 4. Defense counsel is not ineffective for failing to object to admissible evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, since Shelby's testimony was admissible, we conclude that defendant has failed to show that defense counsel was ineffective for failing to object.

Defendant next contends that defense counsel was ineffective in eliciting testimony from Sayles that defendant was previously imprisoned and that defendant was on parole on August 29, 2004. We disagree.

A review of the lower court transcript reveals that Sayles testified to her relationship with defendant during defendant's imprisonment at Kinross Correctional Facility "four or five years" prior to defendant's trial on the instant charges. Sayles testified that she was defendant's supervisor, and that defendant was "such a good worker" that Sayles could possibly employ defendant after he was released from Kinross. Further, Sayles testimony indicates that she hired defendant after he was released and that defendant was driving one of Sayles's vehicles on August 29, 2004. Sayles generally testified to defendant's character, specifically stating that she had never seen defendant in possession of "narcotics" or "contraband."

A review of defense counsel's examination of Sayles indicates that defense counsel was attempting to explain to the jury that defendant was employed at the time he committed the charged offenses and that Sayles never saw defendant in possession of a firearm or drugs. Sayles testimony was consistent with the defense counsel's theory of the case that he presented through defendant's aunt, Denise Solomon, i.e., that defendant was not in possession of drugs or a firearm on August 29, 2004. This Court will not second guess a trial counsel's decision to call or question a witness with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). Additionally, the jury was aware that defendant had a prior conviction through the parties' stipulation that defendant had a prior felony conviction. Defense counsel may have presented Sayles's testimony to explain the circumstances surrounding defendant's prior conviction. Thus, we conclude that defendant has failed to overcome the presumption that defense counsel eliciting Sayles's testimony was trial strategy. *LaVearn, supra* at 216. Further, defendant has failed to show that, but for defense counsel eliciting Sayles's testimony, the result of the proceedings would have been different. *Carbin, supra* at 599-600. Thus, we conclude that defendant cannot maintain his claim of ineffective assistance of counsel.

Affirmed.

/s/ Jessica R. Cooper

/s/ Janet T. Neff

/s/ Stephen L. Borrello